

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2108

To be argued by
GERALD J. RYAN

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In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT TURNER 12327,

Petitioner-Appellant,

- against -

J.E. LAVELLE, and E.S. LEFEVERE, individually
and as Wardens, Benjamin Ward, as Commissioner
of Corrections, Dr. Villanueva, Dr. Scores,
Dr. Bissenette, Mrs. Brennan, R.N., Medical
Staff at Clinton Correctional Facility,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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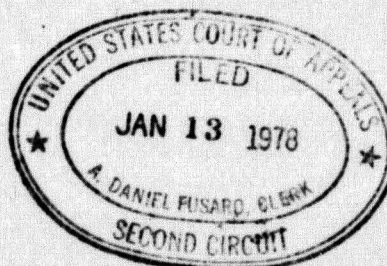


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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal taken by Plaintiff from a judgment of the U.S. District for the Northern District of New York (Port, J.) entered July 13, 1977 in which plaintiff incorrectly asserts that such judgment dismissed sua sponte his civil rights complaint.

The Memorandum Decision and Order of Honorable Edmund Port, Senior United States District Court Judge for the Northern District of New York, dated July 13, 1977 merely denied plaintiff-appellant's application for the assignment of Counsel. (See Appendix).

Plaintiff is incorrect in contending in his belief that his civil rights complaint was denied by Chief Judge Foley's Memorandum-Decision and Order dated June 7, 1977. (See Appendix). The complaint was dismissed only as against defendant Dr. Scores, who was represented by private counsel in this matter. As to the remaining Defendants-Appellees, the underlying civil rights action is pending in the United States District Court for the Northern District of New York. The complaint as against Dr. Scores was dismissed by Judge Foley and plaintiff might possibly appeal from that order except that he states in paragraph 4 of his "Belated Certificate of Probable Cause" that "the dismissal of this application as far as Dr. Scores was proper." (See Appendix).

It therefore is apparent that plaintiff is appealing from the Memorandum and Order of Judge Port simply denying him the assignment of counsel. It does not appear that any other order has been made from which he may presently appeal.

Question Presented

1. Whether the District Court erred in denying petitioner's Application for Assignment of Counsel in this Civil Rights Action.

Statement of Facts

Plaintiff in his complaint alleges that Defendants intentionally deprived him of proper medical attention and treatment when he injured his left hand during a sports activity at Clinton Correctional Facility on or about February 12, 1976. Plaintiff seeks monetary damages of \$100,000. On May 19, 1977, the application for assignment of counsel was sent by the plaintiff to the clerk for inclusion in the file. By Memorandum and Order on July 13, 1977 Judge Port denied the application for the assignment of counsel stating that, in view of the substantial money demand for damages, the plaintiff should be able to retain counsel on a contingent fee basis if there were any merit to his claim.

ARGUMENT

PLAINTIFF IS NOT ENTITLED TO THE ASSIGNMENT OF COUNSEL IN THIS CIVIL COMPLAINT

Under 28 U.S.C.A. § 1915(d), in civil proceedings in forma pauperis, the court may request an attorney to represent a person unable to employ counsel. The appointment of counsel in a civil case is, as is the privilege of proceeding in forma pauperis, a matter within the discretion of the district court. It is privilege and not a right. (U.S. ex rel. Gardner v.

Madden, 352 F. 2d 792 (9th Cir. 1965). In Ehrlich v. Van Epps, 428 F. 2d 363 (7th Cir. 1970); and Smith v. Blackledge, 451 F. 2d 1201 (4th Cir. 1971) the courts also found that in civil actions for damages, appointment of counsel should be allowed only in exceptional cases. This involves the exercise of the court's discretion.

While, in contrast to a criminal proceeding in which there is a duty upon the court to assign counsel to represent an indigent defendant, the court in a civil case with respect to the appointment of counsel is endowed with discretion. (Moss v. Thomas, 299 F. 2d 729 (6th Cir. 1962).

It was within Judge Port's discretion to deny plaintiff's application for assignment of counsel in what is essentially a tort action for damages for alleged medical malpractice. Judge Port stated that in view of the substantial money demand for damages, the plaintiff should be able to retain counsel on a contingency fee basis if there were any merit to his claim. Plaintiff has not shown that he is unable to retain counsel on such a basis or that the Court in this instance abused its discretion in denying plaintiff's Application for Assignment of Counsel.

CONCLUSION

ASSUMING IT IS APPEALABLE, THE
DISTRICT COURT ORDER OF JULY 13,
1977 DENYING THE APPLICATION FOR
THE ASSIGNMENT OF COUNSEL IN THIS
CIVIL ACTION SHOULD BE AFFIRMED.

Dated: New York, New York
January 5, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellees

SAMUEL A. HIRSHOWITZ
First Assitant Attorney General

GERALD J. RYAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Ghislaine Salomon , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for
herein. On the 13th day of January , 1978, she served
the annexed upon the following named person :

MR. ROBERT TURNER
Box 6 (D 2-16)
Wallkill, New York 12589

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
13th day of January , 1978


Assistant Attorney General
of the State of New York

